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No. 80-1827

In the Supreme Court of the United States

OCTOBER TERM, 1980

R.G. RUSS, JR., ET UX., PETITIONERS

v.

TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
LAURA FROSSARD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the petitioners had the burden of establishing by a preponderance of the evidence that the environmental impact statement adopted by the Federal Highway Administration was inadequate.

2. Whether the district court's finding that the environmental impact statement adopted by the Federal Highway Administration was adequate was clearly erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-5) will not be reported. The opinion of the district court (Pet. App. B-1 to B-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1980. A petition for rehearing was denied on February 3, 1981 (Pet. App. D-1). The petition for a writ of certiorari was filed on May 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Texas Highway Department planned to upgrade fourlane highway U.S. 87 to become part of Interstate Highway 27 (IH-27). The contemplated road construction project is 52 miles long, running from Hale Center in Hale

County, Texas, to Happy, Texas, at the Swisher-Randall County line. The proposed route for IH-27 would require condemnation of 28.805 acres of petitioners' farmland.

The Texas Highway Department prepared a draft environmental impact statement (EIS) for the road construction project. This draft EIS was approved by the Federal Highway Administration (FHWA) in May 1972, and subsequently was circulated to sixteen interested federal agencies and local governments.

In May 1973, corridor public hearings were held in two towns near the project.[1] The environmental, social, and economic impacts of the project were discussed. In preparing a final EIS for the project, the FHWA considered written comments submitted by agencies as well as comments made by citizens who attended the public corridor hearings. The final EIS was approved by the FHWA on August 23, 1973.

Highway design public hearings were held in the same two towns in May 1975. At these hearings the impacts of the project were again discussed with the public. Design changes were made in response to public comments. The final EIS was reevaluated by the FHWA, and it was determined that the design changes were not so substantial as to require changes in the EIS.

The final EIS discussed four alternatives to the project, including that of taking "no action." The adverse environmental effects of the project were found to be displacement of families and businesses by acquisition of land for the project, dividing of farms, and increased traffic noise. These effects were not found to affect significantly the quality of

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[1]Hearings on both the location of a highway and its design are required by 23 U.S.C. 128 and FHWA regulations at 23 C.F.R. 790.1 *et seq.*

the human environment. The final EIS found no significant effect on air quality, no increased erosion, and no effect on water quality or the water table.

Petitioners filed this action to enjoin construction of the project, on November 28, 1978, alleging that the final EIS did not comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*[2]

The district court conducted a three-day hearing, and on February 2, 1979, entered judgment for the defendants (Pet. App. C-1). The district court held, *inter alia*, that the petitioners had failed to prove by a preponderance of the evidence that the final EIS had not considered or adequately treated alternatives to and adverse effects of the project or that the defendant had not complied with FHWA Procedure and Policy Memorandum (PPM) 90-1 in preparing the EIS.[3]

On December 19, 1980, the court of appeals affirmed (Pet. App. A-1 to A-7), holding, *inter alia*, that the petitioners had the burden of establishing by a preponderance of the evidence that the EIS was inadequate and that the district court's finding that petitioners had not met their burden was amply supported by the record and not clearly erroneous.

ARGUMENT

The decision below is correct, does not conflict with any decision of this Court or any court of appeals, and does not present any issue warranting review by this Court.

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[2]The complaint also alleged that defendants had violated the Texas Deceptive Trade Practice Act, Tex. Bus. & Com. Code Ann. §17.01 *et seq.* (Vernon 1968), by making false representations during negotiations for purchase of petitioners' land by the Texas Highway Department. The district court held it did not have pendent jurisdiction over this state claim (Pet. App. B-9).

[3]PPM 90-1, 37 Fed. Reg. 21809-21816 (1972), contains the FHWA procedures implementing 42 U.S.C. 4332 which were applicable to the preparation of the final EIS.

1. Petitioners contend that the court of appeals erred in holding that those challenging an EIS have the burden of proof (Pet. 11-12). Petitioners allege here, as they did in the court below, that once they make a prima facie showing that the EIS is inadequate, the burden then shifts to the defendant agencies to show that the EIS adequately discusses all significant environmental effects. The court of appeals correctly held (Pet. App. A-4) that the petitioners had the burden of showing by a preponderance of the evidence that the EIS was inadequate, that any omitted environmental effects were the probable consequence of the project, and that the adverse effects would be significant. *Sierra Club* v. *Morton*, 510 F. 2d 813, 818 (5th Cir. 1975); *Environmental Defense Fund, Inc.* v. *Corps of Engineers of the United States Army*, 492 F. 2d 1123, 1137 (5th Cir. 1974).

2. As the district court found (Pet. App. at B-7 to B-8), the final EIS for this project fully complied with the requirements of NEPA. The preparation of the final EIS satisfied all procedural requirements, and the EIS adequately discussed significant environmental effects of the project and possible alternatives.

Petitioners' claim that the decision in this case conflicts with *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) and *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223 (1980), is without merit. Petitioners cite those cases for the proposition that a court, in reviewing an agency's environmental decisionmaking, should " 'insure that the agency considered the environmental consequences' "[4] That obligation was fully met in this case.

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[4]The statement relied upon by petitioners is extracted from a sentence which reads in its entirety as follows:

> On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of

Petitioners' only allegations of failure to consider environmental consequences are that the EIS did not sufficiently discuss loss of agricultural land, the effect of automobile emissions on crops, the effect of the construction on the watershed and the Ogallala Aquifer,[5] and the "no action" alternative (Pet. 7-8). The district court specifically found that petitioners had not shown that the project would have a significant effect on air quality, the watershed, or the Ogallala Aquifer, or that it would result in an irretrievable loss of agricultural land (Pet. App. B-5 to B-7). The district court also found that the EIS discussed alternative routes and a "no-action" alternative to the project (*id.* at B-7). These findings, held not clearly erroneous on appeal (*id.* at A-4 to A-5), refute any contention that the final EIS was inadequate or that the review undertaken by the lower courts failed to meet the standards set forth in *Vermont Yankee Nuclear Power Corp., supra*, and *Strycker's Bay Neighborhood Council, Inc., supra.*

Petitioners contend that the final EIS was inadequate because it discussed only one segment of the whole IH-27 (Pet. 9-10). However, an EIS for a highway project need not include the whole length of the highway; it need only discuss a logical segment. *Indian Lookout Alliance* v. *Volpe*, 484 F. 2d 11, 16-19 (8th Cir. 1973). The applicable FHWA policy and procedure memorandum requires an EIS for a project to discuss "[a] substantial length of highway between logical termini" (PPM 90-1, 37 Fed. Reg. 21809-21816 (1972)). The district court found that petitioners did

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the executive as to the choice of the action to be taken."

Strycker's Bay Neighborhood Council, Inc. v. *Karlen, supra*, 444 U.S. at 227-228 (citation omitted).

[5]The Ogallala Aquifer is a waterbearing geological formation located 300 to 500 feet under petitioners' land.

not prove that defendants failed to comply with any part of PPM 90-1 in preparing the final EIS (Pet. App. B-7). The court of appeals properly upheld this finding as supported by the record and not clearly erroneous (*id.* at A-4 to A-5).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
LAURA FROSSARD
Attorneys

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[6]Petitioners claim this decision conflicts with *Swain* v. *Brinegar*, 542 F. 2d 364 (7th Cir. 1976) (*en banc*) (Pet. 9-10). However, in *Swain*, the EIS covered a segment of the highway the northern terminus of which was near no major crossroad or population center as required by PPM 90-1. The district court in this case found no violation of the requirements of PPM 90-1.

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